Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TECHNICAL SERGEANT FRANKLIN T. WILSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

ORMOND R. FODREA
Major, United States Air Force
Appellate Defense Counsel
Counsel of Record

KEVIN P. KOEHLER
Major, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

October 1996

22 pp

QUESTION PRESENTED

Whether the petitioner's pleas of guilty to the charge and specifications of use and possession of cocaine were improvident as a matter of due process because petitioner became addicted to cocaine as a result of his undercover work with local police authorities and the Office of Special Investigations' actions were outrageous.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Technical Sergeant Franklin T. Wilson respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on July 30, 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 44 M.J. 223 (1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, reported at 41 M.J. 668 (1994), is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on July 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C.

Sec. 1259(3) (West Supp. 1995) and 10 U.S.C. Sec. 867(a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On October 7 and 8 1992, petitioner was tried by a general court-martial consisting of a military judge sitting alone at Shaw Air Force Base, South Carolina. In accordance with his pleas he was found guilty of cocaine use (3 specifications) and of cocaine possession, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. Sec 912a. Contrary to his pleas, he was found guilty of communicating threats to an agent of the Air Force Office of Special Investigations (OSI) (2 specifications), in violation of Article 134, UCMJ, 10 U.S.C. Sec 934. He was sentenced to a bad conduct discharge, 14 months' confinement, and reduction to airman basic (E-1). On December 22, 1992, the convening authority approved this sentence.

At his trial, the petitioner testified during a providency inquiry that he worked as an undercover agent for the Sumter County, South Carolina, police department in order to combat drug use among the children on his softball team at a local Salvation Army Boys' Club. On one particular occasion, the petitioner was involved in a drug bust of "Fat Mike," a local drug dealer. Later that evening, friends of "Fat Mike" accused the petitioner of setting him up, and the petitioner was forced to use crack cocaine. From that moment on, he became addicted to the drug. Petitioner claimed that the police knew he was addicted to the drug but nevertheless kept using him as an informant.

On November 22, 1994, the Air Force Court of Criminal Appeals set aside petitioner's conviction for drug use while he was acting as an informant for the Sumter County, S.C., Sheriff's Department. However, it upheld his conviction for drug use and possession after his association with that law enforcement agency was terminated. It affirmed a sentence of a bad-conduct discharge, confinement for 12 months, and reduction to E-2 (Appendix B).

On June 30, 1995, the Court of Appeals for the Armed Forces granted review on the following issue of law:

> WHETHER APPELLANT'S PLEAS OF GUILTY TO THE SPECIFICATIONS OF CHARGE I (USE AND POSSESSION OF COCAINE) WERE IMPROVIDENT AS A MATTER OF DUE PROCESS BECAUSE APPELLANT BECAME ADDICTED TO COCAINE AS A RESULT OF HIS UNDERCOVER WORK WITH LOCAL POLICE AUTHORITIES AND THE OSI'S ACTIONS WERE OUTRAGEOUS.

On July 30, 1996, the Court of Appeals for the Armed Forces issued its decision, holding that the petitioner's pleas of guilty were provident and that the petitioner was not entrapped by outrageous conduct on behalf of the Government.

REASONS FOR GRANTING THE WRIT

PETITIONER'S PLEAS OF GUILTY TO USE AND POSSESSION OF COCAINE (CHARGE I AND ITS SPECIFICATIONS) WERE IMPROVIDENT AS A MATTER OF DUE PROCESS BECAUSE PETITIONER BECAME ADDICTED TO COCAINE AS A RESULT OF HIS UNDERCOVER WORK WITH LOCAL POLICE AUTHORITIES AND THE OFFICE OF SPECIAL INVESTIGATIONS ACTIONS WERE OUTRAGEOUS.

Petitioner's drug use subsequent to the time when he had to protect himself from detection by "Fat Mike's" friends was not voluntary but the result of the extremely

addictive nature of crack cocaine. *United States v. Flannigan*, 31 M.J. 240 (1990). In addition, the petitioner was entrapped into possessing the cocaine because the conduct used by the OSI agents was outrageous. The agents in petitioner's case knew he was addicted to cocaine and invited him to a hotel room where they told him he could get drugs for free.

CONCLUSION

Petitioner's pleas of guilty to cocaine use and possession were improvident as a matter of due process when he became addicted to cocaine as a result of his undercover work with local law enforcement personnel and the OSI's conduct was outrageous. Petitioner was denied his constitutional right to due process under the Fifth Amendment.

Respectfully submitted,

ORMOND R. FODREA
Major, United States Air Force
Appellate Defense Counsel
Counsel of Record

KEVIN P. KOEHLER
Major, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

October 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 95-0218

Crim. App. No. 30345

UNITED STATES,

Appellee

v.

FRANKLIN T. WILSON, Technical Sergeant
U.S. Air Force,

Appellant

Argued January 3, 1996

Decided July 30, 1996

OPINION OF THE COURT

SULLIVAN, Judge:

On October 7, and 8, 1992, appellant was tried by a general court-martial composed of a military judge sitting alone at Shaw Air Force Base, South Carolina. In accordance with his pleas he was found guilty of cocaine use (3 specifications) and of cocaine possession, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Contrary to his pleas, he was found

guilty of communicating threats to an agent of the Air Force Office of Special Investigations (OSI) (2 specifications), in violation of Article 134, UCMJ, 10 USC § 934. He was sentenced to a bad-conduct discharge, 14 months' confinement, and reduction to airman basic. On December 22, 1992, the convening authority approved this sentence. On November 22, 1994, the Court of Criminal Appeals dismissed one specification of using cocaine and affirmed a sentence of a bad-conduct discharge, confinement for 12 months, and reduction to E-2. 41 MJ 668, 672.

On June 30, 1995, this Court granted review on the following issue of law:

> WHETHER APPELLANT'S PLEAS OF GUILTY TO THE SPECIFICATIONS OF CHARGE I (USE AND POSSESSION OF COCAINE) WERE IMPROVIDENT AS A MATTER OF DUE PROCESS BECAUSE APPELLANT BECAME ADDICTED TO COCAINE AS A RESULT OF HIS UNDERCOVER WORK WITH LOCAL POLICE AUTHORITIES AND THE OSI'S ACTIONS WERE OUTRAGEOUS.

We hold that appellant's pleas of guilty were provident on the record before us both in law and fact, so no remedial action is warranted. *See United States v. Harrison*, 26 MJ 474 (CMA 1988); *cf. United States v. Flannigan*, 31 MJ 240, 244-45 (CMA 1990).

As noted above, the Court of Criminal Appeals set aside appellant's conviction for drug use while he was acting as an informant for the Sumter County, S.C., Sheriff's Department. However, it upheld his conviction for drug use and possession after his association with that law enforcement agency was terminated. The court below articulated the facts concerning these offenses, as follows:

> Appellant pled guilty to Charge I and its three specifications, which alleged two uses of cocaine oc-

curing, respectively, between 25 and 31 May 1992 and between 12 and 15 June 1992, and cocaine possession on 15 June 1992. He also pled guilty to Additional Charge I, which (after exceptions and substitutions by the accused's plea) alleged cocaine use at divers times between 14 February 1991 and 1 February 1992. During the Care [18 USCMA 535, 40 CMR 247 (1969)] inquiry, the appellant told the military judge that he became addicted to "crack" cocaine while working as a drug informant for the Sumter County, South Carolina, Sheriff's Department. He said his addiction started in February 1991, when he was forced to use the drug by a supplier to prove that he was not an informer. According to the appellant, ". . . ever since it was like, that one hit, it was like gone. Going on. Couldn't stop."

* * * *

Turning to the instances of cocaine use and possession alleged in the specifications of Charge I to have occurred in May and June of 1992, the appellant expressly conceded he was not working in any law enforcement capacity at the time of these offenses. Appellant said that he needed the cocaine, and took the opportunities to use and possess the drug presented to him by the AFOSI informant and undercover agents.[5] However, the appellant maintained that his addiction to "crack" had begun with his work as a drug informant for the Sumter County Sheriff's Department.

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[5] According to prosecution evidence, AFOSI agents got wind of the appellant's drug involvement and successfully targeted him for a "reverse sting" operation.

41 MJ at 669, 670-71 (footnote omitted).

Appellant attacks his pleas of guilty on two related grounds. First, he "asserts that his drug use subsequent to

the time when he had to protect himself from detection from Fat Mike's friends was not voluntary but the result of the extreme addictive nature of crack cocaine." Final Brief at 4. This so-called defense is based on the opinion of this Court in *United States v. Flannigan*, 31 MJ 240 (1990). Second, appellant "asserts that he was entrapped into possessing the cocaine because the conduct used by the OSI agents was outrageous. The agents in appellant's case knew he was addicted to cocaine and invited him to a hotel room where they told him he could get drugs for free." Final Brief at 4 (citation omitted). He bases this argument on the decisions of this Court in *United States v. Bell*, 38 MJ 358 (1993), *cert. denied*, 115 S.Ct. 724 (1995), and *United States v. LeMaster*, 40 MJ 178 (1994). We reject both arguments.

Appellant's initial contention on this appeal is that his guilty-plea responses created a substantial conflict with his pleas of guilty to the cocaine offenses that remain in this case. He impliedly suggests that possession or use of drugs caused by an addiction, incurred as a result of earlier drug use necessitated by police activities, is not unlawful. *See* para. 37c(5), Part IV, Manual for Courts-Martial, United States, 1984, *quoted* in *United States v. Flannigan*, 31 MJ at 245 n.4.* We disagree.

The decision of this Court in *Flannigan* was based on paragraph 37c(5); concessions of the parties in that case; and 21 USC § 885(d). We held that use of marijuana was not unlawful if done by a law enforcement officer under certain circumstances in furtherance of a legitimate drug enforcement operation. Appellant received the benefit of this decision when the Court of Criminal Appeals

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* Appellant couches his argument in terms of voluntariness. He cites no authority, however, for the proposition that an addict can defend against a drug-use charge on the basis of his addiction. *See Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417 (1962); *see generally* R. Perkins and R. Boyce, *Criminal Law* 1015-18 (3d ed. 1982).

vacated his pleas of guilty to drug use because he worked as an informant for the civilian police and was required to use drugs to prove he was not an informer.

Appellant's argument that *Flannigan* also covers the other offenses in his case is most unpersuasive. First, he conceded that he was not acting with the approval of law enforcement authorities, state or military, at the time of his later uses and possession of drugs. Thus, in the sense intended in *Flannigan* his purported vigilante drug investigation could not reasonably be considered "legitimate." Second, there was no showing in this case that his additional uses and possession of drugs were necessary to protect his life or his cover. Absent these conditions, our decision in *Flannigan* does not apply. Moreover, we are not inclined to extend that decision to grant *carte blanche* immunity to one-time police informants for use of drugs when and how they see fit.

Appellant also argues that his plea of guilty to drug possession should be set aside because the Government's outrageous conduct entrapped him. He asserts that "[t]he agents in appellant's case knew he was addicted to cocaine and invited him to a hotel room where they told him he could get drugs for free." Final Brief at 4. He relies on the decisions of this Court in *United States v. Bell* and *United States v. LeMaster*, *both supra*. We again disagree.

Appellant pleaded guilty in this case and expressly waived all possible factual issues concerning his guilt of the charges to which he was pleading guilty. *See* RCM 910(j), Manual, *supra*; *cf. United States v. Bell*, *supra*; *United States v. Cooper (I)*, 33 MJ 356 (CMA 1991). Neither post-trial speculation (*United States v. Harrison*, 26 MJ 474 (CMA 1988)) nor post-trial affidavits as to putative defenses (*United States v. Miles*, 12 MJ 377, 379 (CMA 1982)) are a proper basis to upset guilty pleas prefaced by a providence inquiry appearing to be regular on its face. The record of trial before us makes

clear that appellant was not enrolled in any service program for drug abusers at the time of his alleged offenses. *Cf. United States v. Harris*, 41 MJ 433 (1995). Moreover, there is no indication in the record that the OSI knew that appellant was a cocaine addict enrolled in a treatment program and preyed on that addiction. *See United States v. Cooper, supra* at 358; *United States v. Bell, supra.* In these circumstances, we conclude that no substantial question was raised as to the validity of appellant's guilty pleas. *See United States v. Prather*, 32 MJ 433 (CMA 1991).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX, Judges CRAWFORD and GIERKE, and Senior Judge EVERETT concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 30345

UNITED STATES

v.

Technical Sergeant FRANKLIN T. WILSON, FR248-98-7161
United States Air Force

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22 November 1994

Sentence adjudged 8 October 1992 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: James J. Blommers (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, and reduction to E-1.

Before

DIXON, YOUNG, and BECKER

Appellate Military Judges

OPINION OF THE COURT

BECKER, Judge:

A military judge, sitting as a general court-martial, accepted the appellant's guilty pleas and convicted him of three specifications of cocaine use and one specification of cocaine possession, all in violation of Article 112a, UCMJ.[1] The military judge also convicted the appellant, despite his pleas, of two specifications of communicating threats to injure two agents of the Air Force Office of Special Investigations (AFOSI), in violation of Article 134, UCMJ.[2] Appellant was sentenced to a bad-conduct discharge, 14 months confinement, and reduction to E-1. Appellant asserts 12 assignments of error, among them a contention that his pleas of guilty to cocaine use were improvident. We agree, in part. We set aside one of his convictions, dismiss that charge and specification, and reassess his sentence.

I. BACKGROUND

Appellant pled guilty to Charge I and its three specifications, which alleged two uses of cocaine occurring, respectively, between 25 and 31 May 1992 and between 12 and 15 June 1992, and cocaine possession on 15 June 1992. He also pled guilty to Additional Charge I, which (after exceptions and substitutions by the accused's plea) alleged cocaine use at divers times between 14 February 1991 and 1 February 1992. During the *Care*[3] inquiry, the appellant told the military judge that he became addicted to "crack" cocaine while working as a drug informant for the Sumter County, South Carolina, Sheriff's

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[1] 10 U.S.C. § 912a (1988).

[2] 10 U.S.C. § 934 (1988). The military judge acquitted the accused of one specification of resisting apprehension and one specification of obstruction of justice, punishable under Article 95 (10 U.S.C. § 895 (1988)) and 134, UCMJ, respectively.

[3] *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

Department. He said his addiction started in February 1991, when he was forced to use the drug by a supplier to prove that he was not an informer. According to the appellant, ". . . ever since it was like, that one hit, it was like gone. Going on. Couldn't stop."

In the portion of the *Care* inquiry covering Additional Charge I and its specification, the appellant said he carried on his activities as a police informant and continued to use "crack" cocaine during contacts with drug suppliers. Although admitting his addiction, the appellant also claimed that his cocaine use was necessary to protect his cover. He complained that he tried to persuade his police handlers to let him play a non-using dealer, but they refused:

> You know, I kept trying to tell Sumter County, look here, send me in there at $100, $50, you know, a $200, maybe an eight ball, then I could play the part of a dealer, you see. But I'd go in there [and] I had to play the part of an addict and get the rock for them and that's what I did. I, you know, I was playing the part of an addict and I turned into a real addict doing it.

The military judge asked the appellant if anyone from the Sheriff's Department had authorized him to use cocaine. Appellant replied "[t]hey did not verbally authorize me, but I felt that they knew I was using cocaine in there during that time to get the job done . . . I told them if that's what it takes to get 'em and you know, get the job done . . . ." When asked if he used the cocaine because he wanted it due to his addiction, the appellant said "I used it because I was mad, and I wanted to do something, and I wanted to find the drugs. I wanted to put some of these dealers behind jail, behind cells. I used it because of I got addicted to it . . . ." Despite these statements, the appellant conceded his use of cocaine under these circumstances had been unjustified and wrongful, even after explanations from the military judge that

"wrongful" did not include situations where he had acted as an undercover police source and used cocaine to protect his cover.

At the close of the military judge's initial inquiry into the specification of Additional Charge I, the trial counsel expressed that she was "just a little bit shaky" on the providence of the accused's plea. In response, the military judge continued the inquiry:

> MJ: Can we go over that just one time again, Sergeant Wilson? The additional charge, and this is the period between February '91 and February '92. Now this is the period of time when you indicated to me that at least on some occasions you were trying to assist the Sumter County Sheriff's Department, right?
>
> ACC: Yes, sir.
>
> MJ: Now, were there occasions, you know, more than one, some occasions during this year period of time where you were not involved in providing information to them, but you just on your own obtained and used cocaine?
>
> ACC: Right.
>
> MJ: There were?
>
> ACC: Yes, sir, me and Andrews [4] did.
>
> MJ: You knew what you were doing?
>
> ACC: Yes, sir.
>
> MJ: And you knew what you were using was cocaine?
>
> ACC: Yes, sir.
>
> MJ: Okay, and on those occasions, again, as I defined that term to you, do you know your use was

[4] The appellant described "Andrews" as a friend who also worked as a police drug informant.

wrongful? In other words, it was without legal justification or authorization?

ACC: Yes, sir.

MJ: Satisfactory, Capt Homolka?

TC: Yes, sir. . . .

However, this portion of the inquiry must be considered along with an earlier exchange which covered the same ground:

MJ: Okay. So there were—were there occasions during this period that you were—where you used cocaine that you were not also—it was not also an instant [sic] where specifically you were seeking information to provide for the county sheriff's department?

ACC: Well, every time I used it and I would find ways of—I was addicted to it and I used my addiction to find information.

MJ: Okay, well—

ACC: And if—okay, say like I wanted the drug. I had to have the drug every three or four days. I had to have it there, you know. I was like my body was hurting inside. But during that addiction time when I found a new source to get the drug from I would turn it over to the Sumter County.

MJ: You'd give them that information?

ACC: I'd give them that information.

MJ: But were you going out to get the drug and use it because of your addiction?

ACC: Yes, sir.

Turning to the instances of cocaine use and possession alleged in the specifications of Charge I to have occurred in May and June of 1992, the appellant expressly con-

ceded he was not working in any law enforcement capacity at the time of these offenses. Appellant said that he needed the cocaine, and took the opportunities to use and possess the drug presented to him by the AFOSI informant and undercover agents.[6] However, the appellant maintained that his addiction to "crack" had begun with his work as a drug informant for the Sumter County Sheriff's Department.

II. DISCUSSION

This Court will not question a military judge's acceptance of guilty pleas unless the record reveals a substantial basis in law and fact for doing so. *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991). The mere possibility of a defense does not, of itself, provide such a basis. *United States v. Clark,* 28 M.J. 401, 406-407 (C.M.A. 1989). However, in evaluating the providence of guilty pleas, we must accept an accused's statements at face value. *United States v. Jemmings,* 1 M.J. 414, 418 (C.M.A. 1976). If an accused's account of events is inconsistent with guilt, the plea must be rejected. *United States v. Adams,* 33 M.J. 300, 303 (C.M.A. 1991).

Applying these principles, the military judge's inquiry does not establish the providence of the appellant's guilty pleas to Additional Charge I and its specification. Drug use, which would otherwise be illegal, is not wrongful if done by a law enforcement agent in furtherance of legitimate drug enforcement operations. *United States v. Flannigan,* 31 M.J. 240 (C.M.A. 1990). This is so even if the agent has been trained in drug use "simulation" and directed to avoid situations where he may have to "simulate" use, but nonetheless actually ingests the drug. *Id.* According to the appellant's statements, his police handlers implicitly condoned his cocaine use as necessary to

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[6] According to prosecution evidence, AFOSI agents got wind of the appellant's drug involvement and successfully targeted him for a "reverse sting" operation.

"get the job done." However, even if there had been an explicit instruction not to use drugs, the appellant would still have been potentially entitled to this defense. Although the appellant admitted finding sources of "crack" and using it without direction from the Sumter County Sheriff's Department, it is clear that he still considered this part and parcel of his activities as a drug informant—"I used my addiction to find information." In the face of these statements, we do not find the appellant's concessions of "wrongfulness," made in response to the military judge's leading questions, to be persuasive. Whether this drug use was in furtherance of legitimate law enforcement operations was a question for the trier of fact, and could not be resolved by the military judge as consistent with the appellant's guilty plea.

We do not reach the same conclusion regarding the cocaine uses and possession reflected in the specifications of Charge I. These occurred several months after the divers uses alleged by the specification of Additional Charge I and, by the appellant's express admission, some time after his association with the Sumter County Sheriff had ended. Although the appellant claimed these offenses occurred because of an addiction traceable to his work as a public operative, this fact alone would not raise a defense. We decline to extend the finding in *Flannigan* to excuse this manner of drug abuse.

III. DECISION

We set aside the appellant's convictions of Additional Charge I and its specification and, in the interest of judicial econmy, they will be dismissed. We must now try to decide what the sentence would have been absent those convictions. *United States v. Sales,* 22 M.J. 305, 307 (C.M.A. 1986). If we can determine what sentence probably would have been adjudged, we may reassess it; otherwise, we must return the case for a rehearing. *United States v. Jones,* 39 M.J. 315, 317 (C.M.A. 1994); *United*

States v. Peoples, 29 M.J. 426 (C.M.A. 1990). If we can determine what sentence would probably have been adjudged, we then must decide whether the sentence, as reassessed, is nonetheless appropriate. *Peoples*, 29 M.J. at 428; *Sales*, 22 M.J. at 308.

After weighing the improper cocaine use conviction against the remaining convictions, we believe we can reassess the sentence. In light of the serious misconduct of which the appellant remains convicted, and the aggravating circumstances (to include the fact the appellant brought his young son to the "reverse sting" cocaine buy of 15 June 1992), we believe the appellant would have received at least 12 months confinement in addition to the other adjudged sentence elements. Consequently, we will reduce the confinement portion of the sentence from 14 to 12 months. However, we note that the appellant has already served the full term of confinement, as adjudged. In order to provide a more meaningful remedy, we will also set aside part of the grade reduction portion of the sentence, and approve only a reduction to E-2. We have given individualized consideration to the seriousness of the offenses, the character and military performance of the appellant, and all circumstances documented in the record of trial. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). We find the sentence, as reassessed, to be appropriate.

We resolve the remaining assignments of error against the appellant. We set aside the findings of guilt to the specification of Additional Charge I and Additional Charge I, which we hereby dismiss. The remaining convictions and that portion of the sentence which includes a bad-conduct discharge, confinement for 12 months, and reduction to E-2 is correct in law and fact. Accordingly, they are

AFFIRMED.

Chief Judge DIXON and Judge YOUNG concur.

[USAF Seal]

OFFICIAL

/s/ Al J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

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